No. 83-103

# In the Supreme Court of the United States

OCTOBER TERM, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS AND TO REMAND THE CASE TO THE NATIONAL LABOR RELATIONS BOARD FOR FURTHER PROCEEDINGS**

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For the reasons set forth below, the Solicitor General, on behalf of the National Labor Relations Board, requests that the portion of the judgment of the court of appeals on which certiorari was granted be vacated and that the case be remanded to the Board for reconsideration in light of *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173 (Feb. 22, 1984).

1. On November 14, 1983, this Court granted the Company's petition for a writ of certiorari limited to the question whether the conduct of two strikers, in telling a nonstriker at his home that they would "take care of" him if he continued to work during the strike, was such serious misconduct as to deprive the strikers of the protection of Section 7 of the National Labor Relations Act, 29 U.S.C. 157, and thus their reinstatement rights under the Act. In concluding

that the strikers were unlawfully discharged for this misconduct, the Board applied the standard that verbal threats unaccompanied by physical acts or gestures do not constitute strike misconduct sufficient to warrant a denial of reinstatement (Pet. App. A40). The court of appeals affirmed, finding that the Board's standard "comports with Section 7 of the Act * * *" (Pet. App. A20).

In its petition for certiorari and brief on the merits, petitioner contends (Pet. 8-13; Br. 7-14) that the Board's "physical acts or gestures" standard is inconsistent with Section 7 of the Act. It urges adoption of the *McQuaide* Standard followed by the First and Third Circuits, *i.e.*, " 'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.' " *NLRB* v. *W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) (quoting *Local 542, International Union of Operating Engineers* v. *NLRB*, 328 F.2d 850, 852-853 (3d Cir.), cert. denied, 379 U.S. 826 (1964)); *Associated Grocers of New England* v. *NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977).

2. On February 22, 1984, the Board issued a supplemental decision in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173, in which it abandoned its prior standard that verbal threats unaccompanied by physical acts or gestures do not warrant a denial of reinstatment.[1] The Board stated (slip op. 7): "Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the *per se* rule that words alone can never warrant a denial of reinstatement in the absence of physical acts." The Board, instead, adopted the *McQuaide* "objective test" for determining whether

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[1]Copies of the Board's decision in *Clear Pine Mouldings* have been lodged with the Court and provided to petitioner.

verbal threats by strikers justify an employer's refusal to reinstate, i.e., " 'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act' " (slip op. 7; see also *id.* at 15 (concurring opinion)).[2]

3. Since the Board no longer adheres to the standard governing the assessment of strike misconduct that petitioner challenges in this case and has adopted, for this and future cases, the *McQuaide* standard (which petitioner contends is the proper standard), there is no longer a legal issue warranting resolution by this Court. The only issue that remains is the application of the *McQuaide* standard to the facts of this case. That is a task which should be performed by the Board in the first instance. See *Bachrodt Chevrolet Co.* v. *NLRB*, 411 U.S. 912 (1973); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Accordingly, it is respectfully submitted that this motion should be granted.

REX E. LEE
*Solicitor General*

MARCH 1984

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[2]The Board overruled "[p]revious Board decisions that failed to apply this standard, including the cases cited in fn. 8, *supra*" (slip op. 8 n.14; see also *id.* at 15 n.2 (concurring opinion)). One of the cases listed in footnote 8 is "*Georgia Kraft Co.*, 258 N.L.R.B. 908, 912-913 (1981), enfd., 696 F.2d 931 (11th Cir. 1983), cert. granted, 52 U.S.L.W. 3386 (U.S. November 14, 1983) (No. 83-103)" (slip op. 6 n.8). The Board added that, in accordance with its usual practice, it would apply the *McQuaide* standard "to all pending cases in whatever stage" (slip op. 8 n.14).